ton, "it may well be doubted whether the courts would sanction such a result."[74] It seems likely that further legislation will be necessary on this point in Porto Rico in order to solve the difficulty.[75]

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UNIFORM STATE LAWS GOVERNING NEGOTIABLE DOCUMENTS OF TITLE.*

OUR forefathers, not foreseeing that the States would some day become one country for commercial purposes,[1] failed to vest in Congress power to regulate *all* commerce, but limited that body to such as was interstate or foreign.[2] An unexpected (and by many now believed erroneous) decision by the Supreme Court of the United States[3] in 1869, that a contract between citizens of different states did not constitute interstate commerce, checked the growth of that unity of law so convenient in the development of industries, national in character. For one hundred years, from 1789, when the Constitution was adopted, to 1890, no practical remedy was presented to free commercial intercourse from the inconvenience of a distinct law for each state. In the latter year, New York created a commission on uniform state laws and called for a National Conference to which some thirty states responded.[4] The present year marks their fifteenth annual meeting. The first fruit of this movement was the Negotiable Instruments Code framed in 1896, now

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[74] *Harv. Law Review*, Vol. 8, p. 35; cf. Holmes, Common Law, 304.

[75] It may be noted that the South African (Transvaal) Court has settled the question by the decision that *causa* in the Civil Law has nothing to do with consideration of modern English Law. Cf. *Law Quart. Rev.* 20, p. 235.

*An address delivered before The Ohio Bankers Association, at Cleveland, Ohio, September 27, 1905, by Francis B. James, of the Cincinnati Bar, President of the Ohio State Board of Uniform State Laws and Chairman of the Committee on Commercial Law of the Commissioners on Uniform State Laws in National Conference.

[1] Mr. Justice Bradley in Oregon S. Nav. Co. *v.* Winsor (1874), 20 Wallace 64.

[2] Constitution United States, Art. I, Sec. 8.

[3] Paul *v.* Virginia (1869), 8 Wallace 168. See also Liverpool Ins. Co. *v.* Oliver (1871); 10 Wallace 566; Hooper *v.* California (1895), 155 U. S. 648; New York Life Ins. Co. *v.* Cravens (1900), 178 U. S. 389; Nutting *v.* Mass. (1902), 183 U. S. 553. Compare Pensacola Telegraph Co. *v.* Western Union Tel. Co. (1878), 96 U. S. 1; Champion *v.* Ames (1903), 188 U. S. 321; New York Life Ins. Co. *v.* Statham (1876), 93 U. S. 24; New York Life Ins. Co *v.* Davis (1877), 95 U. S. 425.

[4] The States now represented in the Conference are Arizona, California, Colorado, Connecticut, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Virginia and Washington.

enacted in thirty states,[5] its passage in Ohio[6] being largely due to the interest manifested by the Ohio Bankers Association.

In 1902, the Conference employed Prof. Samuel Williston of the Harvard Law School to codify the law of sales which was fully discussed at the meetings of 1904 and 1905. Its special features from a banker's standpoint are the sections on negotiable documents of title, the chief examples of which are bills of lading and warehouse receipts. It codifies existing commercial usages and customs by expressly declaring that a document of title to a person or order or bearer, shall be negotiable. This code, with the exception of section thirty-nine (39) received the approval of every commissioner. The controverted section is as follows:

"If goods are delivered to a bailee by the owner, or by a person having capacity to transfer the property in them, and a negotiable document of title is issued for them and they are thereafter attached by garnishment or otherwise or are levied upon under an execution, such attachment or levy shall be invalid against one to whom the document has been negotiated for valuable consideration and who purchased it either before such attachment or levy *or within ten days after the original issue of the document in good faith and without notice of the attachment or levy.*"[7]

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[5] New York, Laws of 1897, chapter 612; 1898, chapter 336. Connecticut, Laws of 1897, chapter 74. Colorado, Laws of 1897, chapter 239. Florida, Laws of 1897, chapter 4524. Massachusetts, Laws of 1898, chapter 533; 1899, chapter 130. Maryland, Laws of 1898, chapter 119. Virginia, Laws of 1897-98, chapter 866. Rhode Island, Laws of 1899, chapter 674. Tennessee, Laws of 1899, chapter 94. North Carolina, Laws of 1899, chapter 733. Wisconsin, Laws of 1899, chapter 396. North Dakota, Laws of 1899, chapter 113. Utah, Laws of 1899, chapter 83. Oregon, Laws of 1899. Washington, Laws of 1899, chapter 149. District of Columbia, Laws of 1899, U. S. Stats., page 785. Arizona, R. S. 1901, Title 49. Pennsylvania, Laws of 1901, chapter 162. Ohio, laws of 1902. Iowa, Laws of 1902, chapter 130. New Jersey, Laws of 1902, chapter 184. Montana, Laws of 1903. Idaho, Laws of 1903. Kentucky, Acts of 1904, chapter 102, to take effect June 13, 1904. Louisiana, Act 64 of 1904, to go into effect August 1, 1904. Kansas, Laws of 1905, chapter 310, approved March 7, 1905; to take effect June 8, 1905. Wyoming, Laws of 1905, chapter 43; to take effect February 15, 1905.. Missouri, Laws of 1905, page 243, approved April 10, 1905; to take effect June 16, 1905. Michigan, Act 265, P. A. 1905, approved June 16, 1905; to take effect September 10, 1905. Nebraska, chapter 83, approved April 1, 1905; to take effect August 1, 1905; in Compiled Statutes of 1905, chapter 41.

[6] Act of April 17, 1902 (95 Ohio Law 162-198).

[7] Prof. Williston has appended the following note to this section:

"This section presents a most difficult question. If the mercantile view of these documents is carried to its logical conclusion, the result would be that while the document is outstanding it represents the property and that it must be seized before the property can be reached by process of law. This is the result reached in most jurisdictions in regard to bills and notes. A less complete adoption of the mercantile view would allow attachment, but would prefer to an attaching creditor a subsequent purchaser for value before maturity. Such jurisdictions as do not wholly exempt parties on bills and notes from liability to garnishment follow this rule. 14 Am. and Eng. Encyc. of Law 770, *et. seq.* This rule has by statute in some states been applied to stock certificates, so that a subsequent purchaser of the certificate is preferred to a creditor attaching the stock on the books of the corporation. Clews *v.* Friedman, 180 Mass. 555.

"In the case of carriers, some protection against garnishment has been given. In most

In view of a very vigorous opposition to this section as thus worded, the approval of the code was postponed for another year for the purpose of obtaining the views of Banking Associations, commercial organizations and others. The effect of this section is to restrict negotiability to ten days from issue. In other words, if a bill of lading or warehouse receipt is negotiated more than ten days after its issue and an attachment were levied on the goods a moment before, the attachment takes preference. Two arguments were advanced in support of this section. The first was, that as thus worded, it would prevent a dishonest purchaser of furniture from a furniture house on credit from taking the furniture to a railroad, obtaining a negotiable bill of lading, leaving for parts unknown, selling the bill of lading and thus cheating creditors. The other was, that it would prevent the small planter in the South who paid a bale or two of cotton a year as rent, from taking the cotton to a cotton gin warehouse, securing a negotiable warehouse receipt, leaving for parts unknown, selling the warehouse receipt and thus cheating his landlord. It must be conceded that these are some of the consequences of making warehouse receipts and bills of lading negotiable but not of limiting their negotiability to ten days.

Somewhat similar consequences have resulted from making promissory notes, drafts, checks and certificates of deposit negotiable but such arguments have never been generally accepted to thus limit by law their negotiability. Similar arguments were advanced against the negotiability of scrip, but LORD CHIEF JUSTICE COCK-

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states, if the goods are actually in transit the carrier cannot be garnisheed. 14 Am. and Eng. Encyc. of Law, 810. A transfer of the bill of lading prevails over a subsequent attachment. Mather *v.* Gordon, 59 At. Rep. 424, (Conn.); Robert C. White Co. *v.* Chicago &c. R. Co., 87 Mo. App. 330; Union Bank *v.* Rowan, 23 S. C. 339; and in Peters *v.* Elliott, 78 Ill. 321, it was held, though on somewhat unsatisfactory reasoning, that an attaching creditor of a consignor was postponed to one who bought the bill of lading subsequently. Compare Saunders *v.* Bartlett, 12 Heisk. 316; Oliver *v.* Moor, 12 Heisk. 482; Woodruff *v.* Railroad, Head 87.

"Property in the hands of warehousemen can doubtless be reached as the law stands at present. In New York a statute was passed exempting warehousemen from being made defendants in any action concerning the title or possession of goods in which they claimed no right other than their lien for charges. This statute, however, was held unconstitutional, Follett Wool Co. *v.* Albany Terminal Warehouse Co., 61 N. Y. App. Div. 296. A similar statute was passed in the District of Columbia and has been sustained by a lower court, but not passed upon by an appellate tribunal. Doubtless a prior purchaser of a warehouse receipt negotiable in form, would be preferred to a subsequent attachment, where such receipts are by statute made negotiable. Adamson *v.* Frazier, 40 Oreg. 273; Roudebush *v.* Hollis, 21 Pa. C.C. 324.

"Very probably the same result would be reached without the aid of a statute in many jurisdictions; though in Maine by statute the property is subject to garnishment until the warehouseman is notified of the transfer of the receipt, without reference to the negotiability of the receipt (Mohun on Warehousemen, 309), following the prevailing rule (left unchanged by this draft) in regard to non-negotiable receipts. Hallgarten *v.* Oldham, 135 Mass. 1. But it seems doubtful if even in states making warehouse receipts negotiable,

BURN, in a noted English case,[8] answered them as follows: "The usage of the money market has solved the question whether scrip should be considered security for and the representative of money by treating it as such. The universality of a usage voluntarily adopted between buyers and sellers is conclusive proof of its being in accordance with public convenience; and there can be no doubt that by holding this species of security to be incapable of being transferred by delivery and as requiring some more cumbrous method of assignment, we should materially hamper the transactions of the money market with respect to it and cause great public inconvenience. No doubt there is an evil arising from the facility of transfer by delivery, namely, that it occasionally gives rise to the theft or misappropriation of the security to the loss of the true owner. But this is an evil common to the whole body of negotiable securities. * * * * It is one which is counterbalanced by the general convenience arising from facility of transfer or the usage would never have become general to make scrip available to bearer and to treat it as transferable by delivery. * * * * Lastly it is to be observed that the tendency of the courts, * * * * , has been to give effect to mercantile usage in respect to securities for money."

As no law can be framed which will not lead to some inconvenience the question is presented whether the instances of fraud suggested outweigh the great economic and industrial advantage of carrying the negotiability of warehouse receipts and bills of lading to its logical consequence as recognized in the actual usages and customs of merchants? Last year the agricultural and manufacturing products of this country amounted to eighteen billions of dollars. Is it not safe to say that in their transition from raw materials to finished products and their distribution to the consumer, they repre-

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the warehouseman is freed from garnishment, or that in garnishment proceedings a purchaser of the receipt would have a higher right than a prior attaching creditor.

"As Section 39 in this draft was first drawn, it withdrew property for which negotiable documents had been issued entirely from attachment or levy on execution and therefore compelled the creditor to seek his remedy against the document. This was first altered to a provision, not forbidding attachment or levy, but providing that a subsequent purchase in good faith would prevail over the creditor's seizure. Even this was thought by some not only too radical a departure from existing law, but also in itself objectionable because of the ready means it afforded fraudulent debtors to cover up their property. To remedy this objection, in part at least, a limit of time within which the document must be taken in order that the purchase should prevail over a prior atachment was inserted, following the analogy of bills and notes which are not fully negotiable when overdue. It may be that the period of ten days tentatively adopted is too short a period, even if the general principle of the section is correct as it stands."

[8] Goodwin *v.* Robarts (1875), L. R. 10 Ex. 337. See also Exploration Co. *v.* London Trading Bank, ltd. [1898] 2 Q. B. 658, and Edelstein *v.* Schuler [1902] L. R. 2 K. B. 144, 155.

sented three times this amount, or fifty-four billions of dollars in commercial transactions? Is it not reasonable to assert that nearly all of these products found their way either into a warehouse or on a common carrier and at some step they have been represented by either a warehouse receipt or a bill of lading? In the same year our exports amounted to $1,460,863,185, our imports to $991,090,-978, a total of $2,451,959,163 each item of which must have been represented by a bill of lading. In 1903, we produced 637,821,834 bushels of wheat, 2,444,176,924 bushels of corn and 10,727,559 bales of cotton. Is it not safe to say that the bulk of these staples was represented by both bills of lading and warehouse receipts? Are the few instances of fraud suggested sufficient to outweigh these colossal transactions, block the wheels of commerce and overthrow well recognized commercial customs and usage by the enactment of this section as thus worded as a rule of law in every state of the American Union? Will bankers continue to advance money on documents which may be subject to secret liens? If the bankers refuse to advance money the bankers will not suffer but the whole industries of our country. If the consequence of the enactment of this section into law is a refusal by the bankers to advance money to a producer who wishes to meet his cost of production and hold his goods for a rising market, a complete overthrow of the universal methods of doing business, which have contributed to the commercial supremacy of the United States, will follow.

The great commercial consequence of negotiability is to turn tangible property and credit into flexible paper currency. As has been well said, the doctrine of negotiability rests upon the banking or currency theory. A warehouse receipt or bill of lading to be truly negotiable must stand on exactly the same basis as a bond if it is to pass current as a part of our flexible paper currency, so necessary to the expansion of our trade and commerce.[9]

Demand promissory notes merely represent intangible credit and may become overdue; negotiable documents of title are the representatives of tangible property and therefore are never overdue.

The merchants gave to the law their customs and usages and now that our legislative bodies are to give to the merchants codes of mercantile law, these codes should so far as possible, embody these customs and usages freed from legal jargon and unhampered by mere legal rules except such as are based on ethical principles underlying all American jurisprudence and principles of economics underlying sane and sound commerce.[10] The commissioners therefore

[9] See Introduction to Third Edition of Chalmer's Digest Bills, Notes and Checks.

[10] See Scrutton Elements of Mercantile Law, Chapters I and II.

look to you for answers to these questions and for information as to what customs and usages should be embodied in these rules of law.

The struggle to secure from courts and legislative bodies full recognition of the customs of merchants, as the law of the land, is an old one. Drafts for a long time were the only documents regarded as negotiable. So late as 1702,[11] LORD CHIEF JUSTICE HOLT declared that promissory notes were "invented in Lombard Street which attempted * * * * to give laws to Westminster Hall; that the continuing to declare upon these notes upon the custom of merchants proceeds from obstinateness and opinativeness;" and in 1703[12] that "the(se) notes * * * * are only an invention of the Goldsmiths in Lombard Street, who had a mind to make a law to bind all that dealt with them." Parliament in 1704[13] came to the relief of the merchants and passed a statute declaring promissory notes negotiable. After vigorous legal struggles bank notes,[14] checks,[15] bonds,[16], scrip[17] and certificates of deposit[18] were successively adjudged negotiable and bills of lading,[19] warehouse receipts[20] and certificates of stock[21] *quasi* negotiable. These judicial decisions as to warehouse receipts and bills of lading did not fully reflect the commercial view and in thirty-five states[22] laws have been passed in which they are declared to be negotiable, and in eleven[23] of which, are declared to be negotiable to all intents and purposes as drafts or promissory notes. This very variety of legislation and conflict of decisions have given rise to the necessity for codifying the law governing documents of title and securing the

[11] Clerke *v.* Martin (1702), 2 Lord Raymond 757.

[12] Buller *v.* Crips (1703), 6 Modern Reports 29.

[13] 3 & 4 Anne, Chap. 9 (II Statutes at Large 106-108).

[14] Miller *v.* Race (1758), 1 Burr. 452.

[15] II Daniel, N. I. (5th Ed.) §1566.

[16] By statute. Bigelow, B. N., & C. (2d Ed.), 10. Of corporations, without statute. *Ibid.*

[17] Goodwin *v.* Robarts (1875), L. R. 10 Ex. 337.

[18] 2 Daniel N. I. (5th Ed.), §1698*a* etc.

[19] Lickbarrow *v.* Mason (1788), 2 Term Reports 63.

[20] See 2 Daniel N. I. (5th Ed.) §1713, etc.

[21] 2 Daniel N. I. (5tn Ed.) §1708, etc.

[22] Alabama, Arkansas, Arizona, California, Colorado, Connecticut, Delaware, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Virginia, Washington and Wisconsin. See *Mohun on Warehousemen,* pp. 3, 24, 27, 38, 43, 59, 63, 75, 81, 83, 97, 177, 194, 230, 255, 281, 285, 293, 294, 307, 309, 314, 315, 316, 333, 354, 382, 457, 458, 485, 496, 508, 524, 545, 591, 592, 603,, 620, 635, 660, 678, 688, 717, 733, 752, 763, 764, 778, 798, 800 and 822.

[23] Arizona, Indiana, Kansas, Kentucky, Louisiana, Maryland. North Dakota, Tennessee, Texas, Washington and Wisconsin. See *Mohun on Warehousemen* 24, 194, 230, 255, 281, 285, 293, 294, 307, 315, 316, 620, 752, 763, 764, 798, 800 and 822.

enactment of the same code in each state. The Commissioners already have a draft of a warehouse code[24] in their hands and a code governing bills of lading is being prepared.[25] The proposed warehouse code has in it a section[26] similar to section thirty-nine (39) to which attention has been called. An error in one necessarily means a repetition of the error in the other.

It is to the bankers and merchants that the Commissioners on Uniform State Laws must look for support in their work of codifying the commercial law. When the question was first agitated in the year 1880 in England of codifying the law of Negotiable Instruments, it was The Institute of Bankers and the Associated Chambers of Commerce that employed the expert to draft the bill.[27] Following the precedent set in our mother country, we appeal to you bankers to guide us in this most important work of making uniform throughout the United States, the law governing negotiable documents of title.

FRANCIS B. JAMES.

CINCINNATI.

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[24] Prepared by Prof. Samuel Williston, of the Harvard Law School, and Mr. Barry Mohun, of the Washington, D. C., Bar.

[25] By Prof. Samuel Williston.

[26] As section twenty-four (24).

[27] Introduction to the Third Edition of Chalmers' Digest Bills, Notes and Checks.